STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CAROL FRIDIE REYES, Charging Party, v. REED DISTRICT TEACHERS ASSOCIATION, CTA/NEA, Respondent.	)	Case No. SF-CO-181 PERB Decision No. 332 August 15, 1983

Appearances: Carol Fridie Reyes, in Pro Per; Kirsten L. Zerger, Attorney (California Teachers Association, CTA/NEA) for Reed District Teachers Association, CTA/NEA.

Before Gluck, Chairperson; Jaeger and Morgenstern, Members.

DECISION

GLUCK, Chairperson: Carol Fridie Reyes appeals a regional attorney's refusal to issue a complaint and his dismissal of her unfair practice charges against the Reed District Teachers Association, CTA/NEA (Association or RDTA).

PROCEDURAL HISTORY

On September 17, 1982, Reyes filed an unfair practice charge alleging that the Association violated section 3544.9 and subsection 3543.6(b) of the Educational Employment Relations Act (EERA)[1] by conspiring to write, in conjunction

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[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise noted, all references are to the Government Code.

Section 3544.9 reads:

> The employee organization recognized or

with the Reed Union Elementary School District (District), a collective bargaining agreement that denies individual teachers the right to redress grievances. She claimed that the Association, by so acting, was willfully negligent and under the influence and authority of the District's superintendent and that, as a consequence, she was left without proper representation.

Attached to her charge is a statement dated September 10, 1982, chronicling instances occurring between March 1980 and September 10, 1982, in which the District allegedly acted improperly against her and the Association failed to provide her with representation. Included are the following allegations:

March 1980: The District decided to involuntarily transfer her from a seventh grade mathematics class to a seventh and eighth grade enrichment program but later reconsidered its decision. It then granted her an "Opportunity Leave" to study

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> certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

Subsection 3543.6(b) reads:

> It shall be unlawful for an employee organization to:
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> . . . . . .
>
> Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

micro-computers pursuant to which she subsequently invested approximately $10,000 of her own money in equipment, training, and materials.

September 1980: Because the District did not purchase computers, she was assigned to develop a mathematics laboratory.

March 5-17, 1981: The District offered her a year's salary if she would resign without due process. She refused the offer and received a "with reservation" evaluation. She informed the Association of the District's action.

March-June 1981: She pursued a grievance on the evaluation through the second level without success. She was unable to appeal to the third level because of illness and the District refused to grant a time extension. She was "unable to counter this decision and lacked RDTA representation."

March 1982: She received an unsatisfactory performance evaluation. She alleges:

> The Reed District "illegally uses . . . 'The Adversary Evaluation Process' without the use of an unbiased third-party 'Decision Maker." The Reed District Administration at present is the prosecutor, Judge and Jury with the power to withhold the Teacher's yearly salary increment based on their subjective evaluations. In my case after attempted bribery, a year's salary to resign. . . .

May 28, 1982: District informed her that she was being reassigned to a substitute teaching position.

June 8, 1982: She filed a job-related stress claim which the District denied. The District reversed its position on

July 6, after she retained counsel.

July 16, 1982: The District once again reassigned her for the coming school year, the seventh such reassignment since March 1980.

August 24, 1982: The superintendent contacted her to determine whether the District's and Reyes' attorneys could work out a retraining program for her. An agreement between the attorneys could not be reached.

September 7, 1982: She returned to work to find that her "Fourth Amendment right to protection of property had been abridged" by the District's opening of a locked cabinet and removal of her personal property.

September 10, 1982: The Association agreed to take her grievance based on a denial of salary and step increases to arbitration.

On October 11, 1982, Reyes filed a "First Amended Charge" alleging that the Association had violated subsection 3543.6(a)[2] as well as the previously stated sections, by failing to utilize a grievance provision in the negotiated agreement and by not responding to her September 17, 1982 written request for representation.

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[2]Subsection 3543.6(a) reads:

> It shall be unlawful for an employee organization to:
>
> (a) Cause or attempt to cause a public school employer to violate Section 3543.5.

The provision reads:

> The Association shall have the right to file a grievance for rights specifically granted to it under the Agreement, but shall not pursue a grievance on behalf of an individual unless at the written request of that individual.

The September 17, 1982 letter reads:

> Dear Nancy:
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> RDTA Executive Board's decision to sustain Grievance in reference to the Grievance filed by this employee was right and reasonable. Your statement to the District Teachers was objective. I appreciate your time and your energy.
>
> If only this action did address the Contract breaches that are on going it would be fine, but it does not. The Administration is determined to use the weakness of the Contract - the inability of the individual to redress Grievance - to harass and breach the Contract at will. Implicit in the Contract of the District is the CONSTITUTIONAL Fourth Amendment Right for the protection of Personal Property...I discussed this matter with you by phone. Secondly, the breach of the contract clause for Retraining. These two very important issues require that I have further RDTA representation and legal counsel. Please let me know what help can be expected.

The amended charge includes a request that all documents referred to in the original charge be attached and incorporated.

In dismissing Reyes' charges, the regional attorney considered only the allegation that the Association breached its duty of fair representation when it failed to respond to her September 17, 1982 letter. It was his position that the

October filing was an amended charge rather than an amendment to the original charge. Relying on PERB and NLRA precedent, he found that the Association's refusal to respond to Reyes' September 17 request was, at most, an act of negligence which is an insufficient basis for finding a breach of the duty of fair representation.

In her appeal, Reyes restates much of the original and amended charges and adds a considerable number of new allegations.

DISCUSSION

Two issues are presented by this appeal from the dismissal: (1) Did the amended charge replace the original charge? (2) Does the charge state a prima facie case?

The regional attorney's construction of the pleadings was inappropriate. We do not assume that Reyes, who apparently is not an attorney, understood the distinction between an "amendment to the charge" and an "amended charge." PERB's rules are silent on the differences and there is nothing in the record to indicate that Reyes was informed of such distinctions by the investigating regional attorney. Further, Reyes' amended charge did specifically refer to all the documents included in the initial filing and included the request that they be incorporated. Accordingly, we consider the two pleadings as a single charge.

In deciding whether a charge which has been dismissed without a hearing states a prima facie case, we deem the essential facts alleged to be true. San Juan Unified School District (3/10/77) EERB Decision No. 12.[3] Reviewing the allegations in this light, we are constrained to find that the charge must be dismissed.

The charge essentially asserts two alleged violations of EERA: the denial of Reyes' statutory right to be represented in negotiations resulting from RDTA's alleged collusion with the District, and to be provided with representation in certain individual disputes with her employer. But, EERA subsection 3541.5(a)(1) prohibits the Board from issuing a complaint where the alleged violations of the Act occurred more than six months prior to the filing of charges. For this reason, much of the contents of the charge cannot be reached.

The 1981 negotiations: The agreement became effective on July 1, 1981, more than 14 months prior to the filing of the original charge. Even if the contract were to be considered as constituting a continuing violation, we would not find grounds for issuing a complaint. In Rocklin Teachers Professional Association (Thomas A. Romero) (3/26/80) PERB Decision No. 124, the Board recognizing that the exclusive representative, when

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[3]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

faced with the difficult task of negotiating and pleasing all of its constituents, should be afforded a broad range of discretion and latitude, said:

> The exclusive representative's obligation during the collective negotiating process necessarily involves a high degree of give and take, compromise and trade off and, therefore, cannot be subjected to a standard more rigid than is consonant with the realities of the bargaining process. Because the task of bargaining demands a balancing of benefits against burdens, a union should not be required to justify every decision it makes at the bargaining table.

The Board was also cognizant of the need of unit members to be protected from the arbitrary, discrimiatory or bad faith conduct of its bargaining representative. It indicated that an individual can establish a prima facie violation if he can establish that the "representative's conduct has gone beyond the bounds of reasonable latitude." Reyes' allegation is no more than a bald assertion of wrongdoing. It provides no facts which indicate that the Association's conduct exceeded those bounds or that it acted under the influence of District administration.

Events alleged in Reyes' September 10, 1982 statement: The only allegation reflecting an arguable breach by the Association concerns her grievance of her evaluation of March 1981. She states, "I was unable to counter [the District's grievance] decision and lacked RDTA representation." (Emphasis added.) This event also occurred more than six months prior to the filing of her charge.

Failure to respond to the September 17, 1982 letter: In Rocklin, supra, the Board noted:

> A prima facie case alleging arbitrary conduct violative of the duty of fair representation must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rationale basis or devoid of honest judgment. (Emphasis added.)

There are no facts presented here which would justify a finding that the Association's failure to respond to Reyes was either without rationale basis or devoid of honest judgment. Reyes merely asserts that the Association has not responded to her request for representation. Yet, she acknowledged that the Association was submitting her grievance to arbitration. We cannot find in RDTA's failure to respond to her letter of September 17, standing alone, evidence of arbitrary, discriminatory, or bad faith conduct on its part.

Failure to utilize contract grievance procedure: The charge contains the bare allegation that:

> RDTA has practiced unfair representation in behalf of this employee by failure to execute RDTA's negotiated contract: Section IV [(E)] . . . .

Section IV(E) of the agreement establishes the Association's right to file grievances over violations of rights granted to it and proscribes its pursuit of grievances for breaches of individual rights unless the individual specifically requests such representation in writing. The provision is clearly a limitation on RDTA's right to file grievances and does not

impose on it an absolute obligation to file and represent all individuals, in all matters, whenever so requested. But, even if we were to so interpret the provisions, the charge does not detail any incidents occurring in the six months preceding the filing of her charge which demonstrate that the Association breached such a duty.

Allegations raised for the first time on appeal:

Certain "incidents" were presented for the first time in Reyes' appeal from the dismissal of her charge. Some deal with events which allegedly occurred prior to her filings, some with incidents which allegedly occurred after her charge was dismissed. Since we limit ourselves to the question of the legal adequacy of the charge, we consider none of these allegations here.

In summary, the Board finds that the facts set forth in the charge, including the amendment thereto, fail to justify the issuance of a complaint based on allegations that the Association violated rights granted to the charging party by the Educational Employment Relations Act.

The Board therefore ORDERS that the charge be dismissed and no complaint shall be issued thereon.

Members Jaeger and Morgenstern joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD
San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, California 94108
(415) 557-1350

(ATTACHED FOR INFORMATION ONLY)

December 16, 1982

Carol Fridie Reyes

Kirsten Zerger
California Teachers Assn. CTA/NEA
1705 Murchison Drive
Burlingame, CA 94010

Nancy Cook, President
Reed District Teachers Association
c/o Reed Union School District
Karen Way
Tiburon, CA 94920

Re: REFUSAL TO ISSUE COMPLAINT AND DISMISSAL OF UNFAIR PRACTICE CHARGE
Carol Fridie Reyes v. Reed District Teachers Association
Charge No. SF-CO-181

Dear Parties:

Pursuant to Public Employment Relations Board (PERB) Regulation section 32730, a complaint will not be issued in the above-referenced case and the pending charge is hereby dismissed because it fails to allege facts sufficient to state a prima facie vaiolation of the Educational Employment Relations Act (EERA).[1] The reasoning which underlies this decision follows.

On September 17, 1982, Ms. Carol Fridie Reyes, on behalf of herself, filed an unfair practice charge against the Reed District Teachers Association, CTA/NEA (Association) alleging violations of EERA sections 3544.9 and 3543.6(b). On October 13, 1982, an amended charge was filed which alleged, as well, a violation of EERA section 3543.6, subdivision (a). More specifically, charging party alleged that the Association breached the duty of fair representation owed to her when it failed to respond to her letter, dated September 17, 1982, requesting "further RDTA representation and legal counsel" concerning two issues: the Reed Union School District's (District) failure to accord her retraining under Article X of the collective bargaining agreement; and the District's violation of what she regards as a contractually-implied Fourth Amendment right to be free of unlawful searches and seizures.

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[1]References to the EERA are to Government Code section 3540 et seq. PERB Regulations are codified at California Administrative Code, Title 8.

My investigation of the charge revealed the following. Ms. Reyes is a member of a collective bargaining unit represented by the Association. She asserts that she was involuntarily transferred to her present position as fifth grade teacher, that she has not taught at that or any other regular single grade level during the previous five years, and that therefore she is eligible for retraining under Article X of the collective bargaining agreement. On September 17, 1982, Ms. Reyes wrote a letter (attached hereto) to Nancy Cook, President of the Association. She complained of ongoing contract breaches which included, in her view, violations of her Fourth Amendment rights,[2] which she deems to be protections implied in the contract, as well as Article X (Retraining).

The Association president, Ms. Nancy Cook, acknowledges that she received but failed to respond to charging party's letter of September 17, 1982. Ms. Cook explains that: (1) the Association had on September 15, 1982 voted to pursue Ms. Reyes' grievance to advisory arbitration;[3] (2) concerns expressed by charging party in her letter of September 17, 1982 appeared to be incorporated in that matter; (3) charging party had engaged the services of a private attorney in her effort to arrive at some mutual agreement with the superintendent's office concerning retraining; (4) charging party's letter did not appear to request the filing of a new grievance; and (5) despite subsequant contact with Ms. Reyes, no further request or inquiry was made concerning the retraining or invasion of Fourth Amendment rights. Ms. Cook concluded therefore that charging party's letter did not request representation in addition to that already being provided in related matters.

Charging party concedes that she did not state or explain her request to the Association on any subsequent occasion and that she did not want a further grievance to be filed on her behalf. Her notion, at the time, was that the Association's attorneys should pursue a civil suit on her behalf.

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[2]Ms. Reyes contends that she returned to her employment on September 7, 1982 and found her combination-locked cabinet opened and all the materials missing.

[3]Charging party believes that the District's conduct toward her, which allegedly included involuntary transfers, failure to reimburse her for approximately $10,000 worth of retraining expenses she personally absorbed, and negative evaluations, is motivated by a desire to force her out of employment. Charging party challenged that conduct at various stages of the parties' grievance procedure. On September 15, 1982, the Association's board voted to take her grievance to advisory arbitration.

In Castro Valley Unified School District (12/17/80) PERB Decision No. 149, PERB considered a charge that the exclusive representative of a particular unit member violated its duty of fair representation. It referred to its decision in Rocklin School District (3/26/80) PERB Decision No. 124, wherein it was held that,

> A breach of the duty of fair representation occurs when a union's conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith.

In the Castro Valley case, the PERB held that,

> [A]n employee does not have an absolute right to have a grievance taken to arbitration regardless of the provisions of the applicable collective negotiations agreement. . . . An exclusive representative's reasonable refusal to proceed with arbitration is essential to the operation of a grievance and arbitration system. (Emphasis added.)

The Board explained its reasonableness standard as follows:

> . . . [t]he complete satisfaction of all who are represented [is not contemplated]. A wide range of reasonableness must be allowed to a statutory bargaining representative in serving the unit it represents subject always to complete good faith and honesty of purpose in the exercise of its discretion. Ford Motor Co. v. Huffman (1953) 345 U.S. 330 [31 LRRM 2548, 2551].

The duty of fair representation, codified in EERA section 3544.9, has a parallel under the National Labor Relations Act (NLRA) (29 U.S.C. sections 151 et seq.) (See Steele v. Louisville & Nashville R.R.Co. (1944) 323 U.S. 192 [15 LRRM 708]; Humphrey v. Moore (1964) 375 U.S. 335 [55 LRRM 2031]; and Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369].) PERB has adopted this line of cases. Kimmett v. Service Employees International Union, Local 99 (10/19/79) PERB Decision No. 106. Negligence has been rejected as a basis for finding a breach of the duty of fair representation. In Coe v. Rubber Workers (CA 5, 1978) 571 F.2d 1349 [98 LRRM 2304, 2305], the court cited a distinction made by the U.S. Supreme Court in Motorcoach Employees v. Lockridge (1971) 403 U.S. 274 [77 LRRM 2501], between "honest, mistaken conduct" and "deliberate and severely hostile and irrational treatment." In Robesky v. Quantas Empire Airways (CA 9 1978) 573 F.2d 1082 [98 LRRM 2090] it held that

unintentional conduct will breach the duty only if it is so egregious, so far short of minimum standards of fairness to the employee, and so unrelated to union interest as to be arbitrary or amount to "reckless disregard for the rights of the individual employee." In Florey v. Airline Pilots Association (CA 8, 1978) 575 F.2d 673 [98 LRRM 2543, 2545], the court made clear that,

> improper union motivation is the very crux of the fair representation doctrine and is an essential element in all fair representation cases.

The facts involved in this case do not establish a prima facie violation of PERB's reasonableness standard. Neither the facts alleged or my investigation reveal that the Association's failure to respond to charging party's letter was more than an honest mistake, or that it consisted of "deliberate and severely hostile and irrational treatment" (Motorcoach Employees, supra). The facts alleged accordingly do not establish that the Association breached the duty of fair representation owed to Ms. Reyes. No complaint will be issued and the charge is dismissed.

Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8, part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

You may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this Notice (section 32635(a)). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on January 5, 1983 or sent by telegraph or certified United States mail postmarked not later than January 5, 1983 (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all

parties to the proceeding, and a "proof of service" must accompany the document filed with the Board itself (see section 32140 for the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Very truly yours,

DENNIS M. SULLIVAN
General Counsel

By _____
PETER HABERFELD
Regional Attorney

cc: General Counsel

ATTACHMENT

114 Jor. .n Avenue
San anselmo, CA 94960
September 17,1982

NANCY COOK, PRESIDENT RDTA
REED SCHOOL
1199 TIBURON BLVD.
TIBURON, CA 94920

Dear Nancy:

RDTA Executive Board's decision to sustain Grievance in reference to the Grievance filed by this employee was right and reasonable. Your statement to the District Teachers was objective. I appreciate your time and your energy.

If only this action did address the Contract breaches that are on going it would be fine, but it does not. The Administration is determined to use the weakness of the Contract - the inability of the individual to redress Grievance- to harass and breach the Contract at will. Implicit in the Contract of the District is the CONSTITUTIONAL Fourth Amendment Right for the protection of Personal Property... I discussed this matter with you by phone. Secondly,the breach of the contract clause for Retraining . These are two very important issues require that I have further RDTA representation and legal counsel. Please let me know what help can be expected.

Sincerely,
Carol Fridie Reyes
Carol Fridie Reyes

#SF-CO-181